United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL WITH PROOF OF SERVICE

76-7476

TO BE ARGUED BY
LEON BAER BORSTEIN

B

P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC. as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant-Cross-Appellees,

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees-Cross-Appellants,

-and-

NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a Partnership, (formerly known as Finley, Kumble, Underberg, Persky & Roth and Finley, Kumble, Heine, Underberg & Grutman), and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims-Appellants-Cross-Appellees.

Appeal from a Judgment of the United States District Court for the Southern District of New York

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BRIEF OF ADDITIONAL DEFENDANT ON COUNTERCLAIMS-APPELLANT-CROSS-APPELLEE ROBERT MUH

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(6076-2)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,	
Plaintiff - Appellant - Cross-Appellee,	Docket No. 76-7476
- against -	
CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,	Related Appeals:
Defendants - Appellees - Cross-Appellants,	76-7486 76-7488 76-7489 76-7494
NEWBURGER, LOEB & CO., a New York Limited Partnership, ANDREW M. NEWBURGER, et al.,	76-7495 76-7499 76-7500
Additional Defendants on Counterclaims - Appellants - Cross-Appellees.	

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT ROBERT MUH

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STATEMENT OF THE COURT'S JURISDICTION

The Court's jurisdiction is based upon 28 U.S.C. §1291 and is predicated upon the interlocutory order of Judge Ward[1/]; the final determination of Judge Richard Owen sitting without a jury[2/] in the Southern District of New York whose opinion and order dated July 7, 1976 found the Appellant Muh to be liable jointly and severally with the Plaintiff and other Additional Defendants on Counterclaims to the Defendants; and a judgment on the said opinion and order as against the Plaintiff and each Additional Defendant on the Counterclaim filed on September 1, 1976 and corrected on November 17, 1976.* The certified record of these proceedings has been filed with this Court.

1/ Newburger, Loeb & Co., Inc. v. Gross, 365 F. Supp. 1364 (S.D.N.Y. 1973).

2/ The trial began with a six-person jury and by consent of all parties the jury was withdrawn after 3 weeks of trial.

*Pleadings, Vol. II, pg. 571

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the transfer of the assets of Newburger, Loeb & Co., to Newburger, Loeb & Co., Inc. on February 11, 1971 constituted a "conversion" with respect to the capital contribution of Charles Gross.

2. Whether based on the facts presented at the trial of the issues, Robert Muh knowingly conspired to violate Section 98 of the New York Partnership Law.

STATEMENT OF THE CASE

On February 16, 1971 the Plaintiff, Newburger, Loeb & Co., Inc. (hereinafter sometimes referred to as the "Corporation") as assignee, commenced the instant action against Defendants Charles Gross ("Gross"), Mabel Bleich ("Bleich"), and Gross & Co., by filing and serving a summons and complaint. The complaint alleged in substance that Gross & Co. and its partners Gross and Bleich had "churned" the account of Buckley (the assignor of the claim).

On or about May 3, 1971 Defendants filed their initial answer and counterclaims. The Counterclaim basically charged that the Defendants' assets in Newburger, Loeb & Co., had been converted. The answer added Jeanne Donoghue ("Donoghue") as an Additional Counterclaimant. It also added 16 parties as "Additional Defendants on Counterclaims," namely, Newburger, Loeb & Co. (hereinafter sometimes referred to as the "Partnership"); Andrew M. Newburger; Robert L. Newburger; Leo Stern; Robert L. Stern; Richard S. Stern; John F. Settel; Harold J. Richards; Sanford Roggenburg; Adolphus Roggenburg; Ned D. Frank; Fred Kayne and Charles

Sloane (partners in Newburger, Loeb & Co. at various times during 1970); Robert Muh and Paul Risher (Risher Muh & Co., Inc. was the Management Consultant firm for the partnership during the last six months of 1970); and Alex Aixala (an investor in the Corporation having no contact with the Partnership).

February 28, 1972 an amended answer with counterclaims was filed. The amended answer, substantially identical with the original answer, and containing eight counterclaims, added the law firm of Finley, Kumble, Underberg, Persky and Roth ("Finley Kumble"), Robert S. Persky (a partner in the said law firm) and Lawrence J. Berkowitz (inside house counsel for Newburger, Loeb & Co.) as Additional Defendants on the Counterclaim. (Hereinafter, all Additional Defendants on the Counterclaims are sometimes referred to collectively as "Counterclaim Defendants.")

On April 19, 1972, Defendants Andrew M. Newburger; Robert M. Newburger; Leo Stern; Robert L. Stern; Richard D. Stern; John F. Settel; Harold J. Richards; Sanford Roggenburg; Adolphus Roggenburg; and Ned D. Frank moved for an order dismissing the counterclaims on various grounds. On the

same date, April 19, 1972, Plaintiff and other Additional Defendants on Counterclaim also moved to dismiss the counterclaims on various grounds. On May 26, 1972, the Gross Defendants moved for summary judgment on their behalf.

On June 28, 1972 Alex Aixala moved for summary judgment on his behalf. These various pretrial motions were decided by Judge Ward in an opinion dated October 16, 1973.[3/] In that opinion Judge Ward held that the Complaint presented triable issues; and that the Third, Fifth, Sixth, Seventh and Eighth Counterclaims of the Defendants could be maintained only as setoffs. Judge Ward found as a matter of law that a certain transfer of assets from Newburger, Loeb & Co., to Newburger, Loeb & Co., Inc. violated Section 98 of the New York Partnership Law resulting in damages to Gross, Bleich and Donoghue. The case was set down for trial on the issue of damages.

On June 16, 1975, a jury trial of the issues was commenced. Richard Owen, District Judge for the Southern District of New York presided over the trial. After 3 weeks of trial, and by consent of all parties, the jury was withdrawn and the case proceeded as a bench trial.

3/ Newburger, Loeb & Co., Inc. v. Gross, supra.

The factual presentation was completed on August 1, 1975 1975. The case against Alex Aixala was dismissed at the close of the Defendant's proof. On July 7, 1976, Judge Owen rendered an Opinion and Order in which he found the Plaintiff and all the Additional Defendants except Lawrence J. Berkowitz, to be liable to Defendants jointly and severally as follows:[4/]

1. The Plaintiff and the Counterclaim Defendants including Muh were found jointly and severally liable to Gross for the wrongful conversion of his capital contribution of $337,921 plus interest from February 11, 1971.

2. The Plaintiff and the Counterclaim Defendants including Muh were found jointly and severally liable to Bleich for the wrongful conversion of her capital contribution of $76,868.75 plus interest from February 11, 1971.

3. The Plaintiff and the Counterclaim Defendants including Muh were found jointly and severally liable to Donoghue for the wrongful conversion of her capital contribution of $76,868.75 plus interest from February 11, 1971.

4. Kayne, Risher, Newburger Loeb & Co., Inc., Persky and Finley Kumble were found jointly and severally liable

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4/ By memorandum and order dated November 17, 1976 Judge Owen corrected his judgment of September 1, 1976 by deleting Muh's name from Paragraph 2(b) of the judgment. Paragraphs 4 and 5 above reflect the deletion. (App.-PL Vol. II-571)

to Gross for the conversion of his "in kind" securities of $58,000 plus interest, and $75,803 plus interest.

5. Kayne, Risher, Newburger Loeb & Co., Inc. and Persky, and Finley Kumble, were found jointly and severally liable to Gross in the sum of $50,000 as punitive damages.

6. All the remaining claims of the parties were dismissed.

Notice of Appeal was timely filed.

This Brief is filed on behalf of Appellant Robert Muh.

This Brief limits itself to the two legal points stated in the "Statement of Issues Presented for Review." Other reviewable legal points such as the jurisdiction of the Court to handle the counterclaims, the finding that Section 98 was violated, the amount and calculation of damages, the existence of a conspiracy, multiple conspiracies the liability of clients who rely upon advice of counsel, etc., are not briefed herein, but are argued in co-Appellants briefs on appeal. Pursuant to F.R.A.P. 28, Appellant Muh adopts by reference those arguments where applicable as if fully set forth herein.

STATEMENT OF THE FACTS

From 1962 to 1966, the partnership of Gross & Co., was a stock brokerage house. David Buckley was a customer of Gross & Co. and had an active brokerage account therein (A 756-797).[5/] Gross, Bleich (Gross' secretary) and Donoghue (Gross' sister) were partners in Gross & Co., but none of them was a partner in Newburger Loeb & Co. during that time. Newburger, Loeb & Co. was also a stock brokerage house at the time. It executed orders for Gross & Co. and sent confirmations and statements to Gross & Co. customers including Buckley. (2294) Buckley had no other contacts with Newburger Loeb & Co. at that time. Buckley eventually charged that during the period 1962-1966 Gross & Co. churned his account. This allegation of churning was later assigned to Newburger, Loeb & Co., Inc.[6/] and is the basis for plaintiff's cause of action herein. (566-633)

In 1969 when Gross & Co. liquidated, Gross became

5/ Appendix pages will be given hereinafter in parenthesis without additional designation.

6/ Other facts relevant to that claim are not relevant to Muh's issues on appeal and accordingly are not set forth herein.

a general partner in Newburger, Loeb & Co. and Bleich and Donoghue became limited partners therein. (2292-3, 4365, E-156) From mid-1969 to August 1970, Gross also held the position of managing partner of the Partnership. (2305) However, in August, 1970 the Partnership suffered substantial continuing operating losses and the other general partners ousted Gross as managing partner. On August 31, 1970 he submitted his resignation as general partner effective as of October 1, 1970. (2324) Defendants Donoghue and Bleich followed suit and each of them gave notice of withdrawal on December 31, 1970 effective immediately. (1645) The respective rights and obligations of withdrawing general and limited partners and remaining partners are delineated in the then operative agreement; the Restated Articles of Limited Partnership As Amended ("Restated Articles") dated February 26, 1970 and terminating by its own terms on December 31, 1971. (E-412)

When Gross was removed as the managing partner, the firm replaced him with Fred Kayne, a partner in their California office, Kayne too ran into difficulties in saving the firm and he resigned as managing partner and general partner of the firm on November 1, 1970, effective

November 30, 1970. (1956-7) He returned to California and remained with the Partnership thereafter as a registered representative only.

During the period of Kayne's stewardship, he brought in the business consulting firm of Risher, Muh & Co., Inc. (2317) Risher, Muh & Co., Inc., a corporation formed between the Appellant Robert Muh and Paul Risher, began advising the Partnership in the summer of 1970 and continued to do so until the Corporation was formed and the Transfer Agreement signed on February 11, 1971. During that six month period, numerous cost saving measures were instituted. Through Muh's personal efforts, the partnership was able to sell their interest in the Buffalo Braves basketball team, thereby saving Charles Gross over $700,000 in personal liability. (3261-2, 3797-8) In 1970 also, the Partnership retained the law firm of Finley Kumble. (1078) Robert Persky, Esq., was the responsible attorney handling the Partnership's matters.

Beginning in the summer of 1970 the New York Stock Exchange recognized the financial difficulties in which the Partnership found itself and required that the Partnership strengthen its capital position by a substantial infusion

of new capital or merge with another more substantial member firm. The alternative presented by the New York Stock Exchange was immediate suspension of the Partnership as a member firm eventuating its dissolution.

Repeated attempts by various members of the Partnership during the last months of 1970 to gain additional capital or merge with a satisfactory member firm failed but the Exchange granted limited extensions with respect to ordering suspension of the Partnership. (644-5)

On November 17, 1970 the New York Stock Exchange wrote the Partnership a strong letter, stating in pertinent part:

> "Under the circumstances and in view of your impaired capital position and loss trend this Department is left with no alternative but to approach the Board of Governors and ask for your suspension under Article XIII of the Exchange's Constitution if your 'Required Excess Capital'is not met by the close of business on November 20, 1970. A signed merger agreement filed with this Department by the close of business on November 29, 1970 will be acceptable in lieu of the Required Excess Capital.
>
> "In the meantime you are directed to take every possible anticipatory step to prepare for possible liquidation of your firm such as discontinuing any purchases for your firm, trading in investment accounts, liquidating proprietary positions, and other administrative procedures in the event of a suspension by the Board of Governors." (644-5, E-1)

And again on January 11, 1971 the New York Stock

Exchange wrote in a Memorandum:

> "I informed Mr. Simpkin that the firm had been advised to proceed with an orderly liquidation...that if this was not accomplished the staff would recommend suspension...when the current agreements expire on January 25, 1971." (E-229)

In the meantime Persky had convinced Alex Aixala to become a shareholder of a new corporation and to transfer to the corporation $1,000,000 worth of Bacardi stock. The partnership in turn agreed to transfer its assets to the corporation; its partners and subordinated lenders to receive securities in the new corporation. The reorganization plan, creating a corporation out of the old partnership, offered a variety of securities to all the general partners (Gross included), limited partners (Bleich and Donoghue included), and subordinated lenders each in accordance with his capital position. The promoters of the new corporation Berkowitz, Kayne, Muh, Risher and Sloane, also would receive securities in the new corporation as would the new investor Alex Aixala. Muh purchased his common stock for a price in excess of book value. (2855, 3296)

In order to induce each person and each group to go

along with the reorganization, many negotiating sessions produced many concessions. Among these were waiver of potential law suits, forgiveness of negative capital position,[7/] assignment of tax rebates, N.Y.S.E. requirements that Kayne and Sloane participated in the management of the firm, etc. (2777-9)

One of the formalistic conditions that obtained was that at the closing on February 11, 1971 Rosenman, Colin, Freund, Lewis and Cohen ("Rosenman Colin"), which at that time represented the Partnership was to issue an opinion letter. That letter should have stated that the transfer was legal under the existing laws.

Prior to the closing everyone knew that Gross, Bleich and Donoghue were not going to sign the Agreement. (667) Earlier Muh and Kayne offered to make a personal payment to Gross to settle his claims but the limited partners balked. (1941) Even as late as December 31, 1970 Bleich signed the tentative agreement of transfer. The law firm of Golenbock and Barell had advised Donoghue to sign also. Eventually Gross, Bleich and Donoghue refused to sign the Transfer Agreement.

7/ In fact, neither Gross nor Kayne could collect the capital due from certain general partners. Muh was able, by forgiving a portion of the debt, to collect 75% of the capital due the Partnership. (2860)

However, everyone was still of the opinion that Gross' signature on the Transfer Agreement was not required by law. (2525, 1918) He was at that time a withdrawn general partner and as such was not entitled to be treated as a partner. As to Bleich and Donoghue their status as withdrawn limited partners gave them certain continuing partnership rights for six months after withdrawal, including the rights of existing limited partners. At a meeting with Philip Mandell, Gross' counsel prior to the closing, the parties discussed an injunction to prevent the closing. Unfortunately Mandell never sought one. (3289, 3926)

Because of the possibility that Bleich and Donoghue would decline to consent to the transfer, the Rosenman Colin firm advised Persky prior to the closing that it would not issue an opinion letter at the closing. (2128-9) When the closing finally did take place Mr. Burak of the Rosenman Colin firm appeared and declined to issue the letter. While there is some dispute in the testimony as to whether Robert Persky volunteered to act as special counsel for the Partnership thereafter or was asked to do so by the partners and attorneys present, it is clear that Persky eventually

did act as special counsel to the Partnership in lieu of Rosenman Colin and issued an opinion letter stating that the Transfer Agreement was legal. (1126)

At that closing, which was held at the offices of Finley Kumble at 477 Madison Avenue, New York, New York, from 2:30 P.M., there were present Lawrence Berkowitz; Fred Kayne; Robert Muh; Paul Risher; Charles Sloane; Robert Persky and two other members of the firm of Finley Kumble (Michael Bamburger and Donald Snider) Andrew and Robert Newburger; Robert Stern; H. Paul Burak of Rosenman Colin; and fifteen others, namely:

David Abrams, Esq. (Richenthal Abrams & Moss)

Andrew P. Davis, Esq. (David & Davis)

Albert Dworkin

Ned D. Frank, Esq.

Thomas A. Hopkins, Esq. (White & Case)

Allen Isaacson, Esq. (Strasser, Spiegelberg, Fried & Franks)

Burton Lehman, Esq.

George B. Levy, Esq. (Silbefeld & Danziger)

Charles E. Lewis, Esq. (Wilkie, Farr)

Donald L. Newburg, Esq.

Stephen Ross, Esq.

Robert A. Steefel, Esq. (Stroock, Stroock & Lavan)

Richard M. Ticktin, Esq. (Ticktin & Malkin)

Ronald S. Tauber, Esq. and

Louis Zimmerman, Esq.

(638, 728-730, 1639-40, 2353, 4293-95)

When Rosenman Colin officially refused to issue the opinion letter at the closing all the attorneys discussed openly the alternatives to the letter. The possibility of dispensing with an opinion letter altogether was discussed and rejected. (3910-12) Persky and others from Finley Kumble explained to Muh, Kayne and others that the problem was Section 98 of the Partnership Law. There was copious testimony that although Burak wouldn't give the opinion letter, he also permitted his clients to enter into the agreement that night. Some testimony indicates that Burak's refusal was purely a function of his firm's inability to find case law supporting a transfer of assets under the unique Partnership predicament. (2576-2580) Muh was told by the three Finley Kumble lawyers that in their opinion a transfer of assets would not be in violation of Section 98. (3981-86) They would, they said, issue an opinion letter that the transfer was valid. Muh

asked if they were sure and they in turn assured him that if they were wrong then the remedy was only an accounting. Muh was never advised that there might be a question of conversion. (3985)

Thereafter, they drafted an opinion letter which was subsequently passed around the room and read by all counsel. The testimony showed that after the letter was read, Mr. Burak permitted his clients, the Newburgers and Sterns, to sign the Transfer Agreement. Bialkin, Steefel, Silverman and others all permitted their clients to execute the Transfer Agreement. There is no testimony that any lawyer told any client that the transfer of the assets would be wrongful or in violation of Section 98 due to the absence of Bleich and Donoghue's signatures. (2225-6) Burak himself testified that he too permitted his clients to execute the agreement. Burak never said to the group that the transaction would violate the law. (2112-18, 2133, 2138)

During the months prior to the closing, the New York Stock Exchange (NYSE) had been kept apprised of the progress towards reorganization. (3272-75) Muh himself made them aware that Gross, Bleich and Donoghue were probably

not going to consent to the transfer. They did not object to the transfer. In fact, Mr. Dilger from the NYSE was at the closing and never voiced an objection. (1024) Lawrence Berkowitz testified that he, as house counsel to the Partnership sent a letter to the SEC telling them of the reorganization and of the fact that Bleich and Donoghue were not going to sign. Berkowitz testified that the SEC approved the transaction. (1017-1020) The SEC insisted however that the new corporation set up a reserve fund of $300,000 (3332) to take care of the contingency of having to make payments to the three as might be required in the future. (3330-32) In fact, such a reserve fund was set up and the capital of the corporation never dipped below a figure which would have impaired that reserve fund at least until after the withdrawal by Robert Muh from the corporation on February 11, 1972.

There is testimony that other counterclaim defendants exerted pressure on Gross to agree to the transfer. It was, in fact, found by Judge Owen that Gross and Bleich were threatened that unless they agreed to approve the Transfer Agreement the instant litigation would ensue.

When they didn't, the Corporation commenced the suit.[8/]

At about the same time that the Transfer Agreement was signed, Kayne and Sloane brought another law suit (later to become the longest arbitration in the New York Stock Exchange) against Gross. That suit charged that Gross fraudulently induced Sloane and Kayne to invest in the Partnership in 1970 and as a result each of them lost his invested capital. Both of these threatened suits were commenced, and each resulted in a verdict for Gross.

Also, at about the same time, Gross sought other employment and apparently had a job offer from the Wall Street brokerage house of Rafkind & Co. Berkowitz, as in house counsel to the Partnership, wrote a letter to Rafkind & Co. pointing out to them that under the Restated Articles Gross was prohibited from entering into this competitive business. Rafkind & Co. did not thereafter employ Gross.

In February, 1972 Muh sold his stock in the Corporation to Risher and two new investors for $50,000 in cash and $350,000 in notes. Only $50,000 was collected on the notes and Muh is presently suing Risher for the remaining $300,000. In November 1973 the Corporation filed a petition in bankruptcy under Chapter XI. Corporation remains to date in Chapter XI.

8/ This suit was begun on February 16, 1971.

D. ARGUMENT

1. Defendant Gross' capital contribution to the Partnership was not "converted" by the execution of the Transfer Agreement on February 11, 1971.

On the pretrial motions, Judge Ward found that the transfer of the assets and liabilities of the Partnership to the Corporation absent the consent of the limited partners Bleich and Donoghue violated Section 98 of the New York Partnership Law and that damages (rather than rescission) was an appropriate remedy for the charges contained in the first, second and fourth counter-claims. Judge Ward, in setting the case down for trial on the issue of damages, did not specify which of the parties -- Gross, Bleich or Donoghue -- was injured as result of the Transfer, nor which of the parties -- Plaintiff or Counter-claim Defendants -- were liable thereunder. Judge Owen's trial findings of fact and conclusions of law as to Muh, held that Muh was liable (jointly and severally with others) to Gross, Bleich and Donoghue for damages Gross, Bleich and Donoghue sustained only as a result of the "wrongful con-

version" of their capital when the Transfer Agreement was executed on February 11, 1971. For all other alleged misconduct, Muh was held not liable. As to Muh's liability to Gross only, Muh herein argues that the District Court's finding should be reversed and that he should not be held liable upon any theory of "conversion," "prima facie tort," or otherwise.

The Court, per Judge Owen, held Muh and others liable to Gross on the First, Second and Fourth Counterclaims, most likely on the theory that they, including Muh had conspired to commit the tort of conversion.[8/] Since the Court did not specify to which counterclaim this finding was applicable, it would be helpful to analyse each.

The First Counterclaim alleges in Paragraphs 7 and 8 thereof as follows:

> "7. The Transfer Agreement is ineffective, void and a nullity because it was executed in violation of Section 98 of The Partnership Law of the State of New York, without the consent of all of the general and limited partners.
>
> 8. The transfer of The Partnership assets to the plaintiff under color of The Transfer Agreement must be set aside and the Corporation, together with all persons named as counterclaim defendants, are liable for damages and to account for their profits in connection therewith." (Pl.II-33)

8/ "In sum, I find (1) in favor of defendant Gross and against plaintiff and each of the additional defendants on counterclaims (except Berkowitz) on the first, second and fourth counterclaims in the sum of $337,921.00 plus interest since February 11, 1971 by reason of the wrongful conversion of his capital. (At pages 28 and 29 of Opinion.) (Pl.II-535-536)

In short, the first counterclaim demands rescission of the Transfer Agreement, creation of a judicial receiver for distribution and a judgment of damages caused by the illegal transfer of the partnership assets to the corporation.

The second counterclaim alleges that the operable agreement (the Restated Articles) dictated that since Gross (as a withdrawn general partner) was not entitled to his money for one year, the remaining general partners, managers and attorneys had a fiduciary duty to Gross. It further alleges that they breached this duty by bringing the Buckley suit (sub judice) in bad faith and by "wrongfully converting," (paragraph 44 of amended answer) the capital interest of Gross. The second counterclaim also asks the Court to find that Muh and others became constructive trustees of Gross' capital interests. The relief sought is an accounting and damages. The issue of a breach of fiduciary duty was made moot by Judge Ward's interlocutory opinion and thus the issue of the existence and possible breach of fiduciary duty was never presented to the trier of the facts.[9/]

9/ "In view of this determination that the Transfer Agreement violated the New York Partnership Law Section 98 (McKinney 1948), the Court need not decide whether the making of the Agreement breached a fiduciary duty owed by the consenting partners to Gross, Bleich and Donoghue." Newburger, Loeb & Co. Inc. v. Gross, supra, at 1370. (Pl.II-455-6)

The fourth counterclaim ultimately alleges at paragraph 64 thereof that "in order to force the consent of" Bleich, Donoghue and Gross to such proposed transfer or to retain the "capital interests" of the three "under color of right" the plaintiff and counterclaim defendants "(a) threatened...numerous causes of action"; "(b) threatened costly litigation"; "(c) wrongfully...stimulated...the Buckley claim"; (d) improvidently settled the Buckley suit"; (e) ...executed the Transfer Agreement"; and "(f) ...maliciously destroyed a valuable opportunity Gross had for gainful employment..." The relief sought by this counterclaim is damages of $100,000 each for Bleich and Donoghue, $500,000 for Gross and punitive damages.

Returning to Judge Owen's opinion, it is seen that he made several different findings of fact and conclusions of law in the body of his opinion not directly in tune with the allgeations above. At pgs. 19 and 20 of his opinion he stated:

> "I find that all of them were actively participating, knowing what each was doing and hoping to reap substantial benefits from this joint conduct. I find that the partners of the Partnership, although motivated by their desires to save thier investments in the operation, lent themselves

to the goals of this conspiracy by affirmatively permitting the Partnership to transfer its assets to the Corporation in violation of Section 98 of the Partnership Law and in violation of their fiduciary duties to Gross, Bleich and Donoghue as other partners, and by their knowing acquiescence in the use by the new team of the various baseless litiation threats against Gross.

"Finding as I do that there was a conspiracy by the defendant members of the Partnership and the new team (except Berkowitz) as officers of the Corporation* and Persky to injure Gross, Bleich and Donoghue in their interests in the Partnership, I find that each is individually and collectively liable, as is Finley Kumble, Persky's firm, to Gross, Bleich and Donoghue for the damages sustained by their conduct."

And further on, the Court stated, at pages 24 and 25, the following:

"Also, similarly, by causing the transfer to take place in knowing violation of Section 98, the members of the new team are individually liable for this damage.

"The members of the new team, by conspiring to effect the transfer of the assets to their new corporation to the damage of Gross, Bleich and Donoghue are also liable individually for the conversion damages specified."

Clearly, the Court did not render its opinion by making findings of fact and conclusions of law on a counterclaim by counterclaim basis. Rather it seemed to say that there was a conspiracy to injure Gross and to convert Gross'

capital in the Partnership for which Muh (and others) was liable. The court did not specify whether this liability was based on a theory of prima facie tort, conversion, breach of fiduciary duty, or contract or any other particular theory.

Appellant Muh contends that the only plausible theory of liability is one of tortious conversion. To see this clearly it is necessary to analyse the other superficially applicable alternative theories.[10/] First, it is relatively clear that the court did not employ the theory of breach of contract in finding Muh liable to Gross. The basic contract, the Restated Articles, were not mentioned by the court in its conclusory statement nor in its findings of facts. The first, second and fourth counterclaims themselves are not causes of action based on a theory of breach of contract. It was the fifth, sixth and seventh counterclaims of defendants Gross, Bleich and Donoghue respectively (Judge Ward held that these claims were to be treated as set-offs) which claimed damages for breach of the Restated Articles.

10/ As indicated above, Judge Ward's opinion on the pre-trial motions eliminated from the trial, the issue of fiduciary responsibility. That issue therefore is not briefed hereinafter.

Moreover, Muh was not even named as a counterclaim defendant in those causes of action.

Second, though not as clear, but nonetheless true, the court did not base Muh's liability to Gross on a theory of prima facie tort. Thorough analyses of the elements of prima facie tort in New York are found in Ruza v. Ruza, 286 App. Div. 767 (1st Dept. 1955). Advance Music Corp. v. American Tobacco, 296 N.Y. 79, (1946), and Brandt v. Winchell, 283 App. Div. 338 (1st Dept. 1954). In Ruza v. Ruza, supra, at 769 the court said, through Judge Breitel:

> "The key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful. The need for the doctrine of prima facie tort arises only because the specific acts relied upon -- and which it is asserted caused the injury -- are not, in the absence of the intention to harm, tortious, unlawful, and therefore, actionable. The remedy is invoked when the intention to harm, as distinguished from the intention merely to commit the act, is present, has motivated the action, and has caused the injury to plaintiff, all without excuse or justification.
>
> "Where, on the other hand...reliance is apparently had only on specific unlawful and tortious acts, the remedy is not in prima facie tort. Then the remedy, if any, is in...traditional tort...Thus, where specific torts account for all the damages sustained, whether provable as general damages or pleadable and provable as special damages, prima facie tort does not lie."

The rule of prima facie tort in New York today is that enunciated by Judge Breitel in Morrison v. National Broadcasting, 24 App. Div. 2d 284 (1st Dept. 1965) rev'd on other grounds 19 N.Y. 2d 453 (1967). Judge Breitel there defined the tort as "the intentional malicious injury to another by otherwise lawful means without economic or social justification, but solely to harm the other" at 287. He also adopted the language of Penn-Ohio Steel Corp. v. Allis-Chalmers Mfg. Co., 7 App. Div. 2d 441, 443-4 (1st Dept. 1959) quoting at 91: "What is important is that there must be the infliction of intentional harm resulting in damages, without legal excuses or justification. (Citations omitted)"

The case at bar fails to meet the requirements of a prima facie tort in several respects. In the first place, there exists "legal excuse or justification." The question of what constitutes a legal excuse or justification has been the subject of many reported cases on prima facie tort. The general rule is that where there exists some other motive for the alleged tortious conduct, such as profit, self interest, or business advantage, the tort will not be proven.

As the Court of Appeals stated in Reinforce, Inc. v. Birney, 308 N.Y. 164, 169-170 (1954):

> "It is now settled law that an essential element of a claim based on prima facie tort is that the defendant's acts and motives are solely malicious and unmixed with any other."

In Benton v. Kennedy-Van Saun Mfg. Corp., 2 App. Div. 2d 27 (1st Dept. 1956) the Court held that the plaintiff had failed to meet the minimum requirements of a prima facie tort where the defendant's excuse for injuring the plaintiff was to obtain a beneficial contract for itself. See also Routsis v. Swanson, 26 App. Div. 2d 67 (1st Dept. 1966) and Squire Records v. Vanguard Recording, 25 App. Div. 2d 190, 191 (1st Dept. 1966) where the Court said that "where there are other motives, e.g., profit, self interest, business advantage, there is no recovery under tort prima facie."

In the case sub judice, the motives of the partners were most definitely not exclusively to injure Gross. Rather, their prime motive was to protect their own investment in the Partnership. Muh's motive at least, was to improve his financial position by obtaining stock in the corporation at a low price. Even the District Court

recognized this where at page 18 of its opinion the court said that although Gross was injured, Muh's intent was to "take over the new operation on a shoe string and directly enrich themselves..." With regard to the general partners, the court said, at page 19: "I find that the partners of the Partnership...[were]...motivated by their desires to save their investments in the operation..."

The lower court most clearly recognized that the driving motivation on the part of the counterclaim defendants was primarily to save the old partnership assets, create a new corporation and make money under the new format. Such motivation withdraws this case from the realm of prima facie tort.

The facts of the instant action also fail to meet another requirement of prima facie tort. The party alleging a prima facie tort must show that something more is involved than another recognized tort. Board of Education v. Farmingdale, 38 N.Y. 2d 397, 406 (1975) "...once a traditional tort has been established the allegations with respect to prima facie tort will be rendered academic." Coopers &

Lybrand v. Levitt, 52 App. Div. 2d 493 (1st Dept. 1976); Knapp Engraving v. Keystone Photo, 1 App. Div. 2d 170 (1st Dept. 1956). The court herein specifically concluded that Muh was liable to Gross "by reason of the wrongful conversion of his capital," and for nothing else. If this were a case of prima facie tort the court should have awarded other special damages. In fact the failure to allege and prove other special damages highlights the true nature of the court's findings. Muh has really been found liable as a converter only.

The arguments in Morrison v. National Broadcasting, supra, later adopted by the Court of Appeals in 1976 in Board of Ed. v. Farmingdale, supra, establish that in New York "the policy of the law is very strong in not hobbling priveleged or morally innocent conduct unless it results in specifically established economic harm," at 293. But if the only economic harm found to be suffered by Gross attributable to Muh's action is the loss of $337,921 due to the tortious conversion of Gross' capital in the Partnership then, the theory of liability is conversion. The court held that several of the counterclaim defendants

were liable to Gross for $134,171.75 in that they purloined his "in kind" securities. Muh was held not liable for this tort. If Muh were really a coconspirator in a prima facie tort, then, under a theory of conspiracy, he should have been held liable for all the acts of the conspiracy, the purloining also. Since he was held not liable for the purloining the lower court has already, albeit tacitly, found that Muh was not part of any overall conspiracy to injure Gross. Since this is a recognized tort then Board of Ed. v. Farmingdale, supra, indicates that the allegation of prima facie tort be rendered academic.

Finally, the only viable theory upon which Muh's liability to Gross can be based is that of tortious conversion. Unless Gross has proven such a conversion by legally sufficient evidence, Muh should not be held liable to Gross.

The evidence adduced at the trial proves that Gross' assets were not converted. Conversion is defined in Prosser, Law of Torts Section 15, Page 79, f.n.73 (4th Ed. 1971) "as an act of wilful interference with a chattel, done without lawful justification, by which any person entitled

thereto is deprived of use and possession." And in New York, conversion is defined "as an unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's right," 10 N.Y. Jur. Conversion Section 1 (1960); Employer's Fire Ins. Co. v. Cotten, 245 N.Y. 102, 105 (1927). In McCoy v. American Express Co., 253 N.Y. 477, 482 (1930) Judge Cardozo wrote "...the essence of conversion...is an infringement of the right to control or of the right to possession..." Judge Cardozo refined that thought by stating at 485 thereat that "A conversion it was not, for there was lacking the possessory right [in the plaintiff] without which conversion is impossible."

The courts have uniformly held that the plaintiff's right to possession of the thing converted must be immediate in order to sustain his right to an action in conversion. In Wise v. Rand McNally, 195 F. Supp. 621, 628 (S.D. N.Y. 1961) the court cited the New York cases of Kaufman v. Simons Motor Sales Co., 261 N.Y. 146 (1933); Pompez Exhibition Co. v. Flatto, 261 App. Div. 613 (1st Dept. 1941); and Laurent v. Williamsburgh Sav. Bank, 28 Misc. 2d 140 (Sup. Ct. 1954) and

said "in order to recover in an action in conversion, Wise must establish that it had title or that it has right to immediate possession, or that it has some property in the chattel in question" (emphasis supplied.)[11/] See also 89 C.J.S. Trover and Conversion Section 74 (1955); and Parkway Mgt. Co. v. Wolfson, 32 App. Div. 2d 306 (1st Dept. 1969).

As clearly stated in the recent case of AMF Inc. v. Algo Distrs., 48 App. Div. 2d 352, 357 (2nd Dept. 1975) per Martuscello J. "The crucial issue here is whether the plaintiff had an immediate right of possession of specific moneys." (Emphasis supplied)

The key question to be resolved therefore is whether, vel non, Gross had an immediate right to his capital interest in the Partnership at the time of the alleged conversion on February 11, 1971.[12/] The answer to this question must be determined by reference to and an interpretation of the Restated Articlesand the applicable sections of the Partnership Law of New York. (E-412)

Effective September 30, 1970, Gross had withdrawn

11/ A limited partner has no property right in the partnership assets Harris v. Murray, 28 N.Y. 574, (1864); Alley v. Clark, 71 F. Supp. 521 (E.D.N.Y. 1947).

12/ Judge Owen held on page 28 of his Opinion that the counter-claim defendants were liable for the "wrongful conversion of [Gross'] capital" and interest thereon from February 11, 1971. Hence the court apparently found that the conversion happened on February 11, 1971.

as a general partner from the Partnership but the Partnership was not required to liquidate upon the withdrawal of a partner. Section 2.1 of the Restated Articles provides that the term of the partnership was to last from January 1, 1969 to December 31, 1971.

> "...unless sooner terminated by consent of the General Partners,...withdrawal of a General Partner shall not terminate the term of the partnership but shall be treated in all respects as a request for voluntary withdrawal by the General Partner as provided in paragraph 7.1(a) below, to take effect as at the last day of the calendar month in which such event occurs."

However, as a withdrawn general partner, Gross had ceased to be a partner for all purposes. Section 7.1(a) of the Restated Articles reads as follows:

> "Any General Partner may withdraw from the partnership upon not less than thirty (30) days written notice to the partnership and to the New York Stock Exchange. Upon the effective date set forth in such notice, the partner giving notice shall cease to be a partner for all purposes and shall be paid out as provided in Article VIII below." (Emphasis supplied)

Section 8.3 thereof provides that the capital interest of a withdrawn General Partner shall remain in the Firm for 12 months after the effective date of the withdrawal.

> The partnership interest of a former General Partner who has withdrawn pursuant to paragraph 7.1...shall remain in the successor firm at the risk of the business for a period of twelve (12) calendar months from the effective date. During that period the interest of such former partner shall be considered as capital of the partnership (which for the purposes of this section includes any successor firm) in the same manner and to the same extent as capital contributed to the firm by a Limited Partner except for the automatic withdrawal rights of paragraph 3.2 above and any claim of the legal representatives of the former partner to such interest shall be subordinated in right of payment to and subject to the prior payment or provision for payment in full of, the claims of all present or future creditors of the firm arising out of any matters occurring before the end of the period...A former partner...shall be treated as a subordinated lender, and shall be paid interest, quarterly, under the highest rate permitted under the laws of New York and the rules of the New York Stock Exchange for so much of the retained capital interest as is represented by cash and two (2%) percent per annum for securities...and the said retained capital interest shall be paid to the former partner or his legal representatives promptly after the close of the twelve (12) month period." (Emphasis supplied)

Thus it is seen that the Restated Articles required the Partnership to continue until December 31, 1971. In the event that one or more partners would withdraw there were provisions for (a) the continuation of the business; (b) retention by the Partnership of the withdrawing partner's capital interests for 12 additional months; (c) use of the withdrawing partner's funds for those 12 months, and (d)

continuation of the use of the name of the Partnership (Section 2.2 of the Restated Articles).

Section 3.5 of the Restated Articles discusses the use to which the assets of a withdrawn general partner could be put:

> The parties hereto further agree that in the event any such partner ceases to be a partner... and the continuation of the partnership by the remaining or surviving partners, with or without other partners or the formation by the remaining or surviving partners of a successor firm with or without other partners, which continuing or successor partnership or firm hold such securities, cash, other property or interests therein for the former partner, or for his estate, all such securities, cash, other property or interests therein at the time such former partner ceased to be a partner shall continue to be treated as partnership property and shall be treated for all purposes as capital contributed by such former partner to the continuing or successor partnership or firm for a period of twelve (12) months after the date on which such former partner ceased to be such, during which time, subject to the provisions of paragraph 8.3 below, no withdrawal of any such securities, cash or other property may be made by such former partner or his heirs or personal representatives.
>
> Upon the expiration of said period of twelve (12) months, such former partner or his heirs or personal representatives...shall have a claim against such continuing or successor partnership or firm with respect to such securities, cash, other property and interests therein, which claim shall be subordinate in right of payment and subject to the prior payment or provision for payment in full of all claims of all creditors of the partnership in which such former partner was a partner and of all creditors of the continuing or successor partnership or firm out of any matters occurring before the expiration of said period of twelve (12) months." (Emphasis supplied)

It was specifically contemplated that during the 12 month period after the withdrawal of a general partner, the limited partnership might transform itself into another partnership or even a corporation and use the funds of the withdrawn general partner. Sections 3.5 and 8.3 of the Restated Articles quoted above refer to the "continuing or successor partnership or firm." In both contexts "firm is distinguished from partnership, to wit: a corporation or sole proprietorship. To that extent, therefore, there was no restriction preventing the Partnership from transforming itself into a corporation as was done here. In light of the above, the Restated Articles did not give Gross the right to immediate possession of his capital interest in the Partnership until October 1971. Nor did he acquire such rights merely because the partnership became a corporation.

The applicable New York State statutory provisions will also be seen to be unavailing to Gross. Section 98 of the New York State Partnership Law, Subdivision 1, reads as follows:

> "A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of the partner in a partnership without limited partners, except

> that without the written consent or ratification of this specific act by all the limited partners, as general partner or all of the general partners have no authority to...
> (b) do any act which would make it impossible to carry on the ordinary business of the partnership."

The clear import of this section is that the general partners cannot do certain acts without the prior consent or subsequent ratification of all the limited partners of the partnership.

On February 11, 1971, with the exception of Gross, his sister and ex-secretary (Bleich and Donoghue) all the general partners, limited partners, and subordinated lenders did consent to and execute the Transfer Agreement which transferred substantially all the assets and liabilities of the Partnership, to Newburger Loeb & Co., Inc. Applying Section 98 and based on the above facts concerning the signing, Judge Ward earlier determined:

> "It is undisputed that limited partners Bleich and Donoghue did not give their written consent to or thereafter ratify the transfer agreement.
>
> The court...concludes that execution of the transfer agreement without the written consent of the limited partners was in violation of the statute." (Emphasis supplied)

Assuming arguendo that Judge Ward was correct in

finding that the transfer was in violation of the rights of Bleich and Donoghue as created by Section 98 of the Partnership Law, the question posed by this brief is whether Gross acquired some right to sue for conversion by virtue of the violation of Bleich and Donoghue's statutory rights.

It is axiomatic in tort law that where there is no duty owed the party there can be no tort committed as to that party. See Prosser, Law of Torts Section 54 (4th Ed. 1971) and Weicker v. Weicker, 28 App. Div. 2d 138, 140 (1st Dept. 1967). In Shubitz v. Consol. Edison Co., 59 Misc. 2d 732 (Sup.Ct. Kings Co. 1969) the court denied liability to the tenant of a building where Con Ed had failed to supply electricity, Judge Cown said at 735:

> "Without duty there can be no breach of duty, and without breach of duty there can be no liability! (Williams v. State of New York, 308 N.Y. 548, 557 (1955))"

In New York, the leading case defining the limits of liability for the breach of a statutory duty is DiCaprio v. N.Y.C.R.R. Co., 231 N.Y. 94, 97 (1921). There the Court said "Where a statutory duty is imposed upon one for the direct benefit or protection of another and the latter is

damaged because this duty is not performed a cause of action arises in his favor based upon the statute (Amberg v. Kinley, 214 N.Y. 531) but no one not included in the class so directly to be benefitted may complain because the statute is not complied with. (Lang v. N.Y. Central R.R. Co., 227 N.Y. 507)." In Brody v. Save Way No. Blvd., 37 Misc. 2d 240 (Sup. Ct. 1962), the court denied liability where the plaintiff had complained that defendant's violation of two city ordinances had resulted in a loss of business. The court said that the plaintiff, a competitor of defendant, was not within the class of persons intended to be protected, citing DiCaprio, supra; Lang v. New York Cent. R.R. Co., 227 N.Y. 507 (1920); DeSerra v. City of White Plains, 30 Misc 2d 817 (Sup. Ct. 1971) and Major v. Waverly & Ogden, 8 App. Div. 2d 380 (2nd Dept.), aff'd, 7 N.Y. 2d 332 (1959). Thus, if Gross is not of the class of persons to be protected by Section 98 then the breach of Section 98 by Muh and others will not give rise to a cause of action by Gross.

In construing Section 98 of the Partnership Law one looks first to the words of the statute. The text of Section

98 states that the general partners, of a limited partnership, have all the rights and obligations of partners in a regular partnership, except as to certain acts. As to those, the statute requires that all limited partners agree before or after the act is accomplished. This gives the limited partners the right to prevent or void certain acts and may give them a cause of action in damages in the proper case. But,by its terms,it affords little solace to a withdrawn general partner holding the status, at best, of a creditor. The maxim of statutory interpretation, expressio unius est exclusio alterius (McKinney's Statutes Section 240), as applied herein, would dictate that only limited partners were given the right under Section 98 to void a transfer. If the law wanted to protect the withdrawn general partner, creditors or debtors of the Partnership, they could have been so specified.

One might look to legislative history to assist in going behind the obvious import of this statute, but that is of no help here. The New York limited partnership legislation was copied almost verbatim from the Uniform Limited Partnership Act ("U.L.P.A."). Section 98 is a

copy of Section 9 of the U.L.P.A. Likewise unavailing are the judicial decisions which might have assisted here. Decisions interpreting Section 98 usually say that this statute created the rights and liabilities of general partners with respect to limited partners within the legislatively created entity called a "limited partnership." See Friedman v. Gettner, 6 App. Div. 2d 647 (1st Dept. 1958), aff'd without opinion, 7 N.Y. 2d 764 (1959) and Bell Sound Studios v. Enneagrsam Prods., 36 Misc. 2d 879 (Civ. Ct. 1962). None speaks directly to the instant issue.

Generally speaking, a statute should be construed to give effect to the purpose of the law-makers, Delafield v. Brady, 108 N.Y. 524 (1888). The court also should place itself in the shoes of the legislators and give the statute such construction as would carry out the intent of the legislature. People ex rel Peake v. Supervisors of Columbia County, 43 N.Y. 130 (1870). But there is nothing ambiguous about this statute, nor does the legislative history or the case law derogate from its plain meaning. In light of this analysis it is respectfully urged that the defendant Gross, as a withdrawn general partner, is not a party for

whose protection this statute was enacted nor for whom it should give a cause of action in damages. Neither should a cause of action accrue to Gross for rescission due to the violation of the statute by the general partners.

Under the circumstances of the case at bar Gross was not even injured by the alleged wrongful transfer. His capital contribution was not due to him until October, 1971. In fact, the terms of the transfer added the Corporation as a party liable to Gross for the return of his capital.

Gross' position in this case is not dissimilar to a criminal defendant against whom the government seeks to introduce evidence obtained in violation of another's Fourth Amendment rights. There it has been held that such a defendant has no standing to move to suppress any evidence Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Capra, 501 F. 2d 267, cert. denied 420 U.S. 990. By analogy, Bleich and Donoghue have been injured and may be awarded damages, but Gross can claim none and must resort to his contract rights.

Another parallel can be drawn in cases involving penal statutes. Where the defendant violated a statute

having penal consequences and the violation caused injury to plaintiff the courts have held that they are without power to grant to plaintiff a civil cause of action. Sheafer v. Breen, Inc., 263 App. Div. 135 (1st Dept. 1941); Nichols & Co. v. Columbus Credit Corp., 204 Misc. 848 (Sup. Ct. 1953), aff'd, 284 App. Div. 870 (1st Dept. 1954); Aquilino v. United States, 10 N.Y. 2d 271 (1961).

The question might also be asked whether Gross alone could sue for rescission of the Transfer Agreement or damages if Bleich and Donoghue did not consent to the transfer but also did not seek to sue at this point. It is most emphatically urged that the answer is that he could not. Drawing a parallel from the law of contracts, where two parties enter a contract eventually breached by one of them and a third party is injured, the law in New York State is that the third party is not entitled to enforce the contract unless he is a (1) donee beneficiary or (2) a creditor beneficiary of the promisee. See Williston on Contracts Section 356 (3rd Ed. 1959); McCullough v. Canadian Pacific Railroad, 53 F. Supp. 5, 34 (1944); and Seaver v. Ransome, 224 N.Y. 233 (1918). Simpson on

Contracts Section 81 (1954 Ed.) states at page 305. "...the only third persons given rights under a contract to which they are not parties are the donees and the creditors of the promisee. Other third persons may be benefitted if the promised performance occurs and correspondingly disappointing if it does not, but they are given no right to enforce the promise. Such persons are called incidental beneficiaries ...An incidental beneficiary acquires no right to enforce the promise."

It is worthy of note that the right to bring an action for conversion amongst partners is subject to the same rules which obtain for others. J. Crane and A. Bromberg, Law of Partnership Section 41 (1968) states that as a general rule one partner "cannot maintain a possessory action, such as replevin against a co-partner." The theory being that each partner is entitled to the possession of the firm property, so that possession in either where there has been neither settlement of the partnership affairs nor total destruction of the property is not wrongful. See Weiss v. Weiss, 154 App. Div. 890 (1st Dept.), rev'g on dissenting opinion below, 75 Misc. 644 (Sup. Ct. 1912);

Dalury v. Rezinas, 183 App. Div. 456 (1st Dept. 1918) aff'd without opinion, 229 N.Y. 512 (1920).

The only maintainable action in partnership law is usually an accounting. See J. Crane and A. Bromberg, supra, at page 400 and cases cited therein. See also 168 A.L.R. 1091; Mannaberg v. Herbst, 45 N.Y. Supp. 2d 197, aff'd without opinion, 267 App. Div. 818 (1st Dept.), aff'd without opinion, 293 N.Y. 657 (1944); Leitner v. Wass, 63 N.Y. Supp. 2d 350 (1946).

The reason is simply that no one partner has an "immediate" right to specific partnership property until an accounting.

In Dalury v. Rezinas, supra, the court said:

> "It is well settled that one partner cannot sue the other at law, as distinguished from an action in equity, with respect to partnership transactions, except after a full accounting, and balance struck, and such an action is on contract and not ex delicto. If one partner betrays his trust, and converts to his own use partnership property, he incurs the usual liability that one partner incurs to another respecting partnership affairs, i.e., to be held liable in an accounting, but he cannot be sued by the other partner for damages in an action for conversion."

See also Sahon v. Rubin, 282 App. Div. 691 (1st Dept. 1953);

and Sasson v. Lichtman, 276 App. Div. 932 (3rd Dept. 1950).

The proper action in this case would have been an injunction to prevent the transfer, testing the Transfer Agreement immediately, It was testified to that Gross' attorney then and now, Mr. Mandell considered an injunction prior to the closing but or his own reasons, chose not to pursue this course of action. Alternatively, the Gross defendants should have sued for an accounting as and per the Restated Articles. The defendants in the accounting suit should have been the corporation and the general partners. Lastly, Gross could have brought an action in contract after October, 1971 against the Corporation and general partners if at that time the Corporation failed to pay over to him his capital interest.

2. Muh did not knowingly conspire to violate Section 98 of the New York Partnership Law.

As discussed above, Muh's liability to Gross exists by virtue of his participation in the alleged conspiracy in which had as its objective the conspiracy in which had as its objective the wrongful conversion of Gross' capital

interests on February 11, 1971.

The tort of conversion, if committed at all, was committed when the general partners transferred the assets and liabilities of the Partnership to the Corporation. Muh's role in this alleged tort was as a promoter of the new corporation and signatore to the Transfer Agreement. His liability to Gross, Bleich and Donoghue for conversion is derivatitive, therefore, as a conspirator, not direct as the convertor or recepient of the converted goods.

There is no separate recognized cause of action for civil conspiracy in New York and such allegations serve only to connect Muh with the acts of his alleged coconspirators. Friedlander v. National Broadcasting, 39 Misc. 2d 612, 615 (Sup. Ct. 1963); Cuker Inc. v. Crow Constr. Co., 6 App. Div. 2d 415, 417 (1st Dept. 1958); Leshay v. Tomashoff, 267 App. Div. 635 (1st Dept.), aff'd, 293 N.Y. 797 (1944).

The law in New York is that the parties who directly convert the victim's goods are liable absolutely, however, the aiders and abettors of that tort are liable as coconspirators only if they knowingly assisted in the commission of the tort. Prosser, supra, Section 15, p. 83, (4th Ed. 1971);

Suzuki v. Small, 214 App. Div. 541 (1st Dept. 1925), aff'd 243 N.Y. 590 (1926); , 89 C.J.S. Trover and Conversion Section 118 (1955), 10 N.Y. Jur., Conversion, Section 43 (1960). Analogously in criminal law a defendant cannot be convicted as a conspirator nor as an aider and abettor merely by showing that he furthered the conspiracy even through the commission of unlawful acts. Ingram v. United States, 360 U.S. 672, 678 (1959); United States v. Aviles, 274 F. 2d 179, 190 (2d Cir.), cert. denied, 362 U.S. 974 (1960). Nor is the showing of association alone enough to establish a conspiracy. United States v. Vilhotti, 452 F.2d 1186, 1189-90 (2d Cir. 1971), cert. denied, 405 U.S. 1041, 406 U.S. 947 (1972). In fact, if Muh executed the Transfer Agreement in the good faith belief, however erroneous, that the signatures of Gross, Bleich or Donoghue were not necessary or that the Agreement was otherwise lawful then Muh is not liable to any one of them. Steiger v. United States, 373 F.2d 133 (10th Cir. 1967). It can be seen that Judge Owen recognized these principles when, in holding Muh liable to Gross, Bleich and Donoghue, he said at page 24 of his opinion "Also, similarly, by causing the transfer

to take place in knowing violation of Section 98, the members of the new team are individually liable for this damage." (Emphasis supplied.) Clearly Muh was neither the transferee of the Partnership assets nor the transferor Corporation. The court found that he was a knowing aider and abettor.

If the opposite were true, that is, that all parties who assisted in the transfer would be legally liable in conversion independent of their knowledge of its legality, then all the parties to the Transfer Agreement -- limited partners, general partners, promoters, subordinated lenders, Alex Aixala, new corporate investor and Lawrence Berkowitz -- as well as all 16 attorneys present at the closing who counseled their clients to sign, likewise should have been joined in this suit and held liable jointly and severally with the general partners of the Corporation. In fact, the Gross defendants never joined the limited partners, the subordinated lenders nor the other attorneys as defendants. Even more importantly Aixala and Berkowitz though parties to the closing were found not liable. Surely it was based on the court's finding that neither had knowledge of the wrongfulness of the acts.

In the case at bar there is insufficient proof as a matter of law to support Judge Owen's finding that Muh knew the transfer on February 11, 1971 was wrongful as to Gross, Bleich or Donoghue. It needs no additional argument at this point to say that the transfer, if wrongful, was wrongful if, and only if, it violated Section 98. The issuance by the Rosenman Colin firm of an opinion letter confirming the legality of the transfer would certainly have exonerated everyone of charges of knowingly converting the Gross defendants' capital assets. However, Rosenman Colin as counsel for the transferor Partnership, did not issue the opinion letter. The uncontroverted explanation given in the testimony of all the witnesses at the trial including Burak himself, Persky, Snider and Bamburger from Finley Kumble, Muh, Bialkin, Steefel, Silverman and the other counterclaim defendants and attorneys, was that Burak could find no precedential case law under Section 98 applicable to the peculiar circumstances of the Partnership. Nonetheless, all the attorneys at the closing, including Burak, still permitted the Transfer Agreement to be signed by their clients.

At one moment at the closing all the attorneys and

clients openly discussed the lack of an opinion letter. There was a discussion of avoiding the opinion letter by the simple expedient of waiving the necessity. Not one attorney present said the transfer as contemplated, without Bleich and Donoghue's consent, violated Section 98. The absence of Gross' signature was never seen as a legal stumbling block. Finally, it was decided by all parties present that Persky would write the letter. A break in the proceedings followed while Persky drafted the letter and then the activity resumed when the letter was passed around to all attorneys. All the attorneys discussed the letter with their clients and every party present thereafter signed the Transfer Agreement.

Muh also discussed the proposed letter with Persky, Bamburger and Snider of Finley Kumble, Risher, Berkowitz and perhaps Kayne at the time. The trial testimony of all of these men was that Finley Kumble assured everyone, including Muh, that the transfer was legal, the letter was accurate and it was sufficient to comply with contractual requirements of an opinion letter. There was no evidence whatsoever that Muh knew or believed or could have known

or believed that the Transfer was wrongful.

In the absence of such direct proof, the Gross defendants would like this court to find that there exists sufficient circumstantial evidence proving that Muh knew the transfer to be wrongful. Such knowledge can be imputed to Muh only if one could infer from the testimony that during the discussions at the closing, Muh was informed that the letter was fraudulent and/or the transfer wrongful. Such a Herculean leap from the unanimous testimonial denial of such a conversation is unsupported by any other evidence. In sum, the Gross defendants have asked this court to sustain the verdict by relying upon surmise and suspicion. Proof of scienter or knowledge of a fact cannot be inferred, it must be proved Anderson v. Molley, 191 App. Div. 573 (1st Dept. 1920). It cannot be based on mere suspicion, conjecture or doubtful interference; Dhooge Bros. Inc. v. Mecho, 15 App. Div. 2d 774 (1st Dept. 1962). See also Lowendahl v. B&O Railroad Co., 247 App. Div. 144 (1st Dept.), aff'd, 272 N.Y. 360 (1936) and Tittering Ton v. Colvin, 270 N.Y. 321 (1936). As was said in Lynch v. Gibson, 254 App. Div. 47 (1st Dept.), aff'd, 279 N.Y. 634 (1938),

"Fraudulent acts will not be presumed nor can they be based merely on suspicion, conjecture or doubtful inference."

In the absence of any direct, or sufficient circumstantial proof of Muh's knowledge of the wrongfulness of the transfer, it cannot be inferred that Muh knew he was committing a wrong when he signed the Transfer Agreement. Therefore the lower court erred in finding Muh liable to Gross, Bleich and Donoghue for "causing the transfer to take place in knowing violation of Section 98."

E. CONCLUSIONS

The lower court erred in finding that Gross' capital interest in Newburger, Loeb & Co. was wrongfully converted on February 11, 1971. Muh respectfully prays that this Honorable Court modify the judgment below by striking his name from Paragraph 2(a).

The lower court additionally erred in finding Muh liable to Gross, Bleich and Donoghue because, as a matter of law, the proof was insufficient to support a finding that he "knowingly" conspired to convert the capital assets of Gross, Bleich and Donoghue. Muh respectfully prays that

the judgment below additionally or alternatively be modified by striking his name and by dismissing the counterclaims as against him.

DATED: New York, New York
February 4, 1977

Respectfully submitted,

SHAW AND STEDINA
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Attorneys for Additional
Defendant on Counterclaims-
Appellant-Cross-Appellee:
ROBERT MUH

Of Counsel:

LEON BAER BORSTEIN, ESQ.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th Rd. MASPETH, NYC.

That on the 4th day of FEBRUARY, 19 77, deponent personally served the within BRIEF OF ADDITIONAL DEFENDANT ON COUNTERCLAIMS-APPELLANT-CROSS-APPELLEE ROBERT MUH upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

(PLEASE SEE ATTACHED LIST)

Robert La Grassa

Sworn to before me this
4th day of FEBRUARY, 1977.

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1978

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Richard D. Stern, Walter D. Stern and Robert L. Stern,
As Executors under the Last Will and Testament of
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